

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FRANKIE LEE MCCANN, JR.,

Plaintiff,

vs.

ERIC FAHNER,

Defendant.

CV-23-111-BLG-SPW-TJC

ORDER OF DISMISSAL

Plaintiff Frankie Lee McCann filed a Complaint alleging violations of his constitutional rights. (Doc. 1.) On January 9, 2024, the Court directed McCann to show cause why his case should not be dismissed on res judicata grounds. (Doc. 8.)

McCann filed three documents in response. (Docs. 9, 10, and 11.) Docs. 9 and 11 are not responsive to the Court's Order and merely reiterate various allegations regarding Defendant Fahner. Doc. 10 states that McCann had been released and was unable to pursue his claims in the prior suit, but the Court finds that argument unpersuasive. As a free man, certainly he would have been able to communicate with the Court in some fashion. He failed to do so, resulting in the dismissal of his prior action. He has not proposed grounds to avoid the doctrine of res judicata. This matter will be dismissed. This dismissal counts as a strike within the meaning of 28 U.S.C. § 1915. (Although dismissal on res judicata grounds is not a "strike" per se, a duplicative complaint may be considered frivolous and


therefore a “strike” for purposes of § 1915(g). *See, e.g., Cato v. United States*, 70 F.3d 1103, 1105 n. 2 (9th Cir. 1995) (a complaint that “merely repeats pending or previously litigated claims” may properly be considered frivolous).)

Accordingly, it is hereby **ORDERED**:

1. For the reasons explained in the Court’s prior Order, this matter is DISMISSED. The Clerk of Court is directed to close the matter and enter judgment pursuant to Fed. R. Civ. P. 58.

2. The Clerk is also directed to have the docket reflect that this matter counts as a strike against McCann.

DATED this 7<sup>th</sup> day of February, 2024.

  
Susan P. Watters  
United States District Court Judge